

INDORE INSTITUTE OF LAW

(AFFILIATED TO D.A.V.V. & BAR COUNCIL OF INDIA, NEW DELHI)

1st & Only Law College of India with NAAC A+ Accreditation in its First Cycle

MOOT PROPOSITION

LEX BONANZA , 2024

1. Saurabh Private Limited is a company incorporated under the Companies Act, 2013 in Lemuria. The laws of India are inspired by the laws of Lemuria as it witnessed a freedom struggle at the same time as Lemuria. In fact, when it comes to the Arbitration and Conciliation Act, 1996, passed by Lemuria, the said act incorporates all the amendments that India brought from 2015 until 2021 into its law related to arbitration. This was done in Lemuria to clear the backlog of cases pending before its courts. In fact, Lemuria in the year 2010, brought the Mediation Act, which was enacted by India in the year 2023.
2. Saurabh Private Limited is in the business of designing, financing, and operating Infrastructure in Lemuria, including highways. The company is also involved in making investments in infrastructure projects in Lemuria.
3. Sometime in the year 2014, Saurabh Private Limited invested in an asset, i.e., a highway in the state of Karakas. The project highway was running from Mayura to Asanur for a stretch of 170 KM (“**the Project Highway**”). The said asset was acquired from Bindal Constructions Private Limited; a subsidiary company of Bindal Petra Pte Ltd. Bindal Petra Pte Ltd. is a company incorporated in the Republic of Petra. Republic of Petra follows laws of Singapore as being close to it.
4. In 2009, Bindal Petra Pte Ltd. successfully bid for the concession agreement for the Project Highway in the state of Karakas on a Design, Build, Finance,

Operate and Transfer (“**DBFOT**”) basis. One of the conditions in the tender document that was accepted by Bindal Petra Pte Ltd. was that it had to open a subsidiary company in Lemuria to sign the Concession Agreement. This led to the incorporation of Bindal Constructions Private Limited in Lemuria and the successful execution of the Concession Agreement between Bindal Constructions Private Limited and the Highway Authority in Lemuria on September 10, 2009 (“**Concession Agreement**”).

5. The Concession Agreement dated September 10, 2009, determined the rights and liabilities of Highway Authority in Lemuria and Bindal Constructions Private Limited. In particular, it stated that after the construction of the Project Highway it was to be maintained in such a manner that for every 1 km of the Project Highway the roughness value of the pavement should not exceed 5000 mm. It further stated that in case during the operation and maintenance period of the Project Highway, Bindal Constructions Private Limited fails to maintain the Project Highway, then it will be liable to pay damages on a per-day basis to the Highway Authority in Lemuria. It further stated that failure to pay damages to the Highway Authority in Lemuria might lead to the cancellation or termination of the Concession Agreement. The dispute resolution clause in the Concession Agreement read as:

“42.1 Dispute resolution

42.1.1 Any dispute, difference or controversy of whatever nature-howsoever-arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the mediation procedure set forth in Clause 42.2.

42.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly,

equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

42.2 Mediation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 42.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 42.3.

42.3 Arbitration

42.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 42.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 42.3.2.

42.3.2 There shall be a Board of three arbitrator, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected.

6. The construction of the said Project Highway was completed by Bindal Constructions Private Limited in the year 2012. In terms of the Concession Agreement dated September 10, 2009, the commercial operation of the Project Highway started on December 10, 2012. From the commercial operation of the Project Highway, Bindal Constructions Private Limited

was to maintain the entire Project Highway till the end of the concession period. It is to be noted that the concession period for the Project was for 20 years starting on September 10, 2009.

7. In the year 2013, Bindal Petra Pte Ltd., approached Saurabh Private Limited for the sale of the asset, i.e., the said Project Highway. It was represented by Bindal Petra Pte Ltd., that the Project Highway for whose sale they have approached Saurabh Private Limited, though constructed by Bindal Constructions Private Limited through an agreement between Bindal Petra Pte Ltd and Bindal Constructions Private Limited, is financed by Bindal Petra Pte Ltd. It was further represented that all the profits that emanate from Project Highway are repatriated to Bindal Petra Pte Ltd. It was further represented that Bindal Constructions Private Limited is managed by a Board of Directors, among which two directors have been nominated and appointed by Bindal Petra Pte Ltd.
8. Based on the aforesaid representations and after conducting due diligence on the Project Highway, Saurabh Private Limited thought of investing in the said asset. For the same, on January 25, 2014, Saurabh Private Limited and Bindal Constructions Private Limited entered into an agreement for the sale of the asset (“**Asset Sale Agreement**”).
9. The agreement entered between Bindal Constructions Private Limited and Saurabh Private Limited defined the rights and liabilities before and after the sale of the asset. One of the liabilities that was bestowed upon Bindal Constructions Private Limited was that it was transferring the asset on an “as is” basis and therefore before the date of the agreement i.e., January 25, 2014, all the liabilities with respect to the said asset were to vest in Bindal Constructions Private Limited. After January 25, 2014, the liabilities with respect to the Project Highway, if they were not continuing, were to vest

with Saurabh Private Limited. The Dispute Resolution clause in the said agreement read as follows:

“1. Any dispute, difference or controversy of whatever nature-howsoever-arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the mediation procedure set forth herein.

2. In the event of any Dispute between the Parties, either Party may initiate mediation and call upon the mediator to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the mediator or without the intervention of the mediator, either Party may require such Dispute to be referred for arbitration.

3. Any Dispute which is not resolved amicably by mediation, as provided herein above, shall be finally decided by reference to arbitration by a three- member arbitral tribunal. One arbitrator each will be appointed by each Party and the two appointed arbitrators will appoint the presiding arbitrator. The arbitration will be governed by the rules of International Alternative Dispute Resolution Centre, Karakas (the “Rules”), or such other rules as may be mutually agreed by the Parties and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be in Petra, and the language of arbitration proceedings shall be English.”

10. The said agreement, dated January 25, 2014, was presented to the Highways Authority and their consent was obtained for the execution of a supplementary agreement to the Concession Agreement dated September 10, 2009. The said supplementary agreement was executed on the date of execution of the Asset Sale Agreement, i.e., January 25, 2014 (“**Supplementary Agreement**”). In the Supplementary Agreement with the Highway Authority, it was recorded that all the rights and liabilities with respect to the said Project Highway are being transferred to Saurabh Private Limited. The Supplementary Agreement further stated that all the commercial terms mentioned in the Concession Agreement will be applicable to the Supplementary Agreement. The Supplementary

Agreement failed to mention that the dispute resolution clause as referred to in the Concession Agreement shall form part of the Supplementary Agreement and/or is incorporated by reference.

11. Bindal Constructions Private Limited failed to construct the Project Highway within the time stipulated in the Concession Agreement. Further, from the commercial operation date of the Project Highway, Bindal Constructions Private Limited had also failed to maintain the Project Highway in terms of the Concession Agreement. Therefore, on June 30, 2013, Bindal Constructions Private Limited and the Highway Authority in Lemuria entered into a settlement agreement (“**Settlement Agreement**”), the salient terms of which are reproduced herein below: -

RELEVANT PROVISIONS OF THE SETTLEMENT AGREEMENT

1. Recital f of the Settlement Agreement reads as:

“f. Bindal Constructions Private Limited has acknowledged that major maintenance and renewal work is their unconditional obligation, which has been delayed. Consequently, notice for damages amounting to Rs. 20 crore for the period 10th December 2012 to 30th June 2013 has been notified to Bindal Constructions Private Limited by the Highway Authority”.

2. Recital g of the Settlement Agreement reads as:

“g. Bindal Constructions Private Limited has agreed to complete the work of major maintenance and repairs in accordance with the provisions of the Concession Agreement on or before 10th December 2012. On completion of the work, the matter of damages shall be re-examined by the Highway Authority.”

3. Para 5 of the Settlement Agreement read as:

“5. TERMS OF SETTLEMENT

5.1 Bindal Constructions Private Limited has agreed to complete the work of major maintenance and repairs in accordance with the provisions of the Concession Agreement on or before 10th December 2012. On completion of the work, the matter of damages shall be re-examined by the Highway Authority.

5.2 The Parties hereby confirm that they don't have any residual, pending or any other claims, disputes or differences against each other in respect of the matters detailed in the Recitals and all claims, demands, disputes etc. of the Parties in relation to the matters detailed in the Recitals against the other party stand settled without any further recourse whatsoever.”

12. After the execution of the Supplementary Agreement dated January 25, 2014, Saurabh Private Limited was served with a notice dated January 29, 2014, from the Highway Authority in Lemuria to pay damages in terms of the Concession Agreement and the Settlement Agreement to the tune of Rs. 44 crores. Saurabh Private Limited approached the Highway Authority in Lemuria and stated that, in terms of the Settlement Agreement, Bindal Constructions Private Limited had completed the work of maintenance by December 10, 2012, and therefore there was no question of the imposition of damages upon Saurabh Private Limited. It was further stated that in terms of the Asset Sale Agreement, which was approved by the Highway Authority in Lemuria, if any damages are to be claimed, they could only be claimed by approaching Bindal Constructions Private Limited. The Highway Authority in Lemuria did not respond to the said reply. Thereafter, Saurabh Private Limited was constrained to approach the Highway Authority in Lemuria to seek arbitration in terms of the dispute

resolution clause. Since, the Settlement Agreement dated June 30, 2013, failed to mention about the dispute resolution clause, Saurabh Private Limited invoked clause 42.3 of the Concession Agreement.

13. Since the Highway Authority in Lemuria did not respond to the notice invoking arbitration, Saurabh Private Limited approached the Hon'ble High Court in the state of Karakas under Section 9 of the Arbitration and Conciliation Act, 1996, to seek immediate interim relief from the notice dated January 29, 2014, issued by the Highway Authority in Lemuria. In the said Section 9 Petition, Saurabh Private Limited made Bindal Constructions Private Limited and Bindal Petra Pte Ltd as parties. Further, in the same Section 9 petition, Saurabh Private Limited sought the appointment of an arbitral tribunal by the Hon'ble Court. The issues raised before the Hon'ble High Court of Karakas in the Section 9 Petition filed by Saurabh Private Limited are as follows:

1. *Whether the Hon'ble High Court of Karakas has jurisdiction to entertain the present Section 9 petition?*
2. *Whether there exists an arbitration clause in the agreement between Saurabh Private Limited and Highway Authority of Lemuria in terms of the Supplementary Agreement dated January 25, 2014?*
3. *Whether in terms of the Settlement Agreement dated June 30, 2013, Saurabh Private Limited could have invoked arbitration, when no arbitration clause existed in the Settlement Agreement?*
4. *Whether Bindal Constructions Private Limited and Bindal Petra Pte Ltd., can be made parties to the arbitration proceedings when no notice was served upon them?*

5. *Whether the due procedure for invoking arbitration against the Highway Authority, Bindal Petra Pte Ltd. and Bindal Constructions Private Limited was followed?*
6. *Whether Saurabh Private Limited can seek the appointment of an arbitrator in a Section 9 petition filed by it for seeking interim relief?*
7. *Whether the ingredients for the grant of an interim injunction are satisfied by Saurabh Private Limited?*

Head, Skill Development Cell

*Director & Dean
Academics*
